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NO. _____

IN THE

Supreme Court of the United States

October Term, 1971

W. TUCKER BLAINE, SR., et al., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit

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To The United States Court of Appeals
For The Fifth Circuit

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, W. Tucker Blaine, Sr., et al., pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit rendered April 30, 1971.

OPINIONS BELOW

The case was tried before a jury in the United States District Court for the Southern District of Texas. The jury returned a verdict in favor of the Petitioners (an-

swering both special interrogatories in Petitioners' favor), and the trial judge entered judgments for Petitioners upon the verdict, on November 25, 1969. This was not officially reported, but is unofficially reported at 70-1 USTC ¶9131. The trial court's judgment on the verdict and the clerk's notice of its order overruling the Respondent's Motion for Judgment Notwithstanding the Verdict are set out in Appendix B, *infra.*

The opinion of the Court of Appeals for the Fifth Circuit was entered on April 30, 1971. It is reported at 441 F.2d 917, and unofficially reported at 71-1 USTC ¶9373. The Court of Appeals' opinion is set out in Appendix B, *infra.*

JURISDICTION

The U.S. District Court had jurisdiction of this case under 28 U.S.C. §1291.

The judgment of the Court of Appeals was entered on April 30, 1971. The *per curiam* order overruling the Petitioners' Petitions for Rehearing (including a Petition for Rehearing *En Banc*) was entered on June 21, 1971. The Fifth Circuit's Opinion and Judgment and June 21 Order appear in Appendix B, *infra.* The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the appellate court had jurisdiction (or lawfully exercised it) over the facts, in this jury case.

2. Alternatively, whether, as a matter of law, no purchased customer list is depreciable.

STATUTE INVOLVED

The applicable taxing statute, Section 167 of the Internal Revenue Code (together with the applicable Treasury Regulations), is set out in Appendix A, *infra*.

STATEMENT OF THE CASE

Petitioners, partners of a fire-and-casualty insurance agency known as Blaine Associates, purchased a customer list (referred to in the insurance industry as an "expirations" list) from another insurance agency in 1962. The selling agent covenanted not to compete for the listed customers for six years. (He, however, was free to, and did, remain in the same business in the same city.)

The policies were mostly homeowners policies, originally written when the customer acquired his home and signed a mortgage. The mortgage loan agency — which had been part of the previous business — was peeled off and sold to a bank when the insurance "expirations" list was sold to the taxpayers.

The taxpayers (Petitioners) claimed such purchased customer list to be a depreciable (wasting) asset. They claimed that its approximate useful life could be reasonably estimated (as being about six years). The petitioners put on seven witnesses who so testified, including three of the Petitioners themselves, and four unrelated experts. Three of the expert witnesses were other fire-and-casualty insurance agents with many years of experience. The fourth was a former insurance agent, now an insurance-agency analyst.

The uncontroverted evidence showed that, in the insurance industry in general, the average useful life of a

purchased customer list approximates six years, for this approximates the average duration of the customer relationships.

The jury found for the Petitioners, answering both special interrogatories submitted to them in the Petitioners' favor. Their verdict appears in Appendix B, *infra*. The interrogatories and the jury's answers were as follows:

[VERDICT]

Question No. One

Does the expiration list purchased by plaintiffs have a useful life which is reasonably ascertainable?

Answer this Question either "Yes," or "No."

Answer: Yes

If you have answered Question No. One "Yes," and only in that event, then answer Question No. Two.

Question No. Two.

What is the useful life?

Answer this Question in terms of years.

Answer: 6 (six) years.

The United States District Judge entered judgments on the verdict in favor of the Petitioners (Appendix B, *infra*).

The Court of Appeals for the Fifth Circuit reversed and remanded the case to the District Court, requiring the entry of a Judgment Notwithstanding the Verdict. The dispositive portion of the Fifth Circuit's opinion is as follows (Slip opinion, pp. 4-5; Appendix B, *infra*):

> The taxpayers' burden in this case was to show by a *preponderance* of *credible* and *convincing* evidence that these expirations are to be legally dis-

tinguished from those in *Commissioner of Internal Revenue* v. *Killian,* 5th Cir. 1963, 314 F.2d 852. The governing rule was recently expressed in *Salome* v. *United States* [5th Cir., 1968, 395 F.2d 990] where it was said:

> "To qualify intangible property for amortization, taxpayers had the burden of establishing that it was of use in the business for only a limited time and that the length of this period was estimable with reasonable accuracy. Treas. Reg. §1.167(a)-3 (1956). *If they had developed evidence,* their task would have been to distinguish the so-called renewals they purchased from the insurance dailies, subscription lists, and expirations involved in *Commissioner of Internal Revenue v. Killian,* 5th Cir. 1963, 314 F.2d 852. * * *"

In *Salome* the Court [5th Cir.] held that the plaintiffs failed to meet their burden of proof. *It is here concluded* that the taxpayers have likewise failed to meet their burden of showing by a *preponderance of credible, convincing evidence* that the particular assets involved had a limited useful life which could be estimated with reasonable certainty. * * * [Emphasis added.]

The taxpayers' Petition for Rehearing and Petition for Rehearing En Banc were summarily denied, *per curiam,* by the Court of Appeals. (Appendix B, *infra.)*

Petitioners' Position. The Petitioners' position is that the appellate court lacked jurisdiction or power (or unlawfully exercised it) in invading the province of the jury. For, matters of weight (convincingness) and credibility were for the triers of fact to decide. Therefore, this Court should reverse, *per curiam,* and reinstate the trial court's judgments on the jury's verdict, since the appellate court lacked power to try the facts.

As noted by the Fifth Circuit itself in *Boeing* v. *Shipman*, 411 F.2d 365, 389 (ftnt. 19) (1969) (*en banc*):

> In at least three diversity cases from this Circuit, the Supreme Court has entered *per curiam* reversals when this Court has substituted its views on the sufficiency of the evidence for those of the jury.[1]

There is, of course, a different standard of review of jury cases in the federal courts, from the Rule 52(a) "clearly erroneous" standard for non-jury cases. *United States v. U. S. Gypsum Co.*, 333 U.S. 364, 395 (1948). Although the right to have a jury trial in a tax case is not a Seventh Amendment right, the scope of review is the same as to jury trials in federal tax cases as in jury trials coming under the Seventh Amendment.[2] A federal appellate court can review and reverse a trial court's factual determination in a non-jury case. But (unless there is no evidence, which, if believed, could support the jury's finding) the appellate court cannot overturn a jury's verdict. Appellate review then is limited to the law, not the facts. The same standard for review of a jury verdict applies to the appellate court as to the trial court on motions for a directed verdict or for judgment notwithstanding the verdict (except that the rule of finality of jury findings "appears to apply with even greater force

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1. The three cases cited were:
(1) *Williams v. Carolina Life Insurance Co.*, 1954, 348 U.S. 802, *reversing* 5th Cir., 210 F.2d 477.
(2) *Swafford v. Atlantic Coast Line R. Co.*, 1955, 350 U.S. 807, *reversing* 5th Cir. 220 F.2d 901 (and also *reversing Atlantic Coast Line R. Co. v. Anderson*, 5th Cir., 1955, 221 F.2d 548).
(3) *Gibbons v. Phillips Petroleum Co.*, 1956, 352 U.S. 874, *reversing* 5th Cir. 232 F.2d 13.

2. Moore's Federal Practice ¶73.07[3], nns 4, 5.

when the trial judge * * * has approved the jury's findings"[3]).

A jury verdict can be overturned in federal cases only when, "without *weighing* the *credibility* of the evidence, there can be but one reasonable conclusion as to the proper judgment."[4]

In the present case the Court of Appeals passed on the question of whether there was a sufficiency of *"credible"* and *"convincing"* evidence, against the *"preponderance"* standard. This it had no power or authority to do. For the jurors were the sole judges of the *credibility* of the witnesses and the *weight* (or convincingness) to be given to their testimony. Every day in hundreds of cases in State and federal courts, juries are so instructed.

In *Lavender v. Kurn,* 327 U.S. 645, 90 L.Ed. 916 (1945), this Court declared the fundamental principle that is dispositive here:

> The jury having made that inference, the respondents were not free to relitigate the factual dispute in the reviewing court. Under these circumstances *it would be an undue invasion of the jury's historic functions for an appellate court* to *weigh* the conflicting evidence, judge the *credibility* of witnesses, and arrive at a conclusion opposite from the one reached by the jury. [Emphasis added.]

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3. 5 Am.Jur.2d, Appeal & Error, §833, pp. 274-275. "[A] verdict which has been approved by the trial court will not be set aside merely because it is apparently against the *weight* or *preponderance* of the evidence." 5A C.J.S., Appeal & Error, §1653, pp. 416-417. [Emphasis added.]

4. 5 Moore's Federal Practice, ¶50.07[2], pp. 2355-2356 (emphasis added).

The appellate court simply had "no power" to upset the verdict herein, based as it clearly was on substantial evidence.[5]

Assuming *arguendo* that the appellate court did have power to review the jury's findings herein, the appellate court erred as a matter of law in holding that the purchased intangible property (customer lists or "expirations" lists) was not depreciable *in law,* though it was shown to be depreciating *in fact.*

This Court has held that reasonable *"accuracy"* or *"certainty"* — as the Treasury Regulations and the Fifth Circuit purportedly require — are not required. In an analogous cost-depletion case, this Court held that even a mere "rough estimate" is sufficient for depreciation, in *United States* v. *Ludey,* 274 U.S. 295, 47 S.Ct. 608, 701 L.Ed. (1927). In a subsequent depreciation case, this Court held that a "reasonable *approximation*" is sufficient. *Burnet* v. *Niagra Falls Brewing Co.,* 282 U.S. 648, 51 S.Ct. 262, 75 L.Ed. 594 (1931). See, also, to the same effect, *Northern Natural Gas Co.* v. *O'Malley,* 277 F.2d 128, 135 (8th Cir.) 1960, where, speaking for the Court, Judge Van Oosterhout stated that "reasonable" depreciation merely means depreciation that is "just, fair and equitable." Judge Blackmun, concurring in *Northern Natural Gas Co.* v. *O'Malley* (pp. 139-141), observed that:

> *Neither does the statute* [Sec. 167] *say* in so many words that an asset, to be depreciable, must have a *definitely limited life.* It *requires only* that the [de-

5. *Bolan v. Lehigh Valley Railroad Company,* 167 F.2d 934 (2d Cir.). See also, in addition to the three Supreme Court decisions cited in the *Boeing* case which were cited above in footnote 1, *Brady v. So. R.R. Co.,* 320 U.S. 476 (1943).

> preciation] allowance be *"reasonable"*. [Emphasis added.]

That "reasonableness" is the sole criterion for depreciation is now the position of the U. S. Government itself (the Respondent herein), in promulgating in January 1971 its new "ADR" liberalized-depreciation policy.

Here the evidence proved *wastingness*, and therefore the only remaining question was approximately *when* the asset reasonably might have been estimated to become used-up, which is merely a "Cohan Rule" factual issue.

REASONS FOR GRANTING THE WRIT

1. In the language of Supreme Court Rule 19, the appellate court "has so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this court's power of supervision."

It is of prime importance, whether all federal and state courts should be told to stop telling juries that they are the sole judges of the credibility of the witnesses and the weight (convincingness) to be given to their testimony.

If a new day has dawned, and the federal appellate courts now can review the facts *de novo* in jury cases, substituting their factual determinations for those of the jury, everyone should know it. In any case, the question is far too important to escape resolution by this Court.

2. Secondly (and again in the language of Supreme Court Rule 19), turning to the tax issue, the appellate court "decided a federal question in a way in conflict with applicable decisions of this court."

The Fifth Circuit applied a "reasonable *accuracy*" or "reasonable *certainty*" standard for estimating depre-

ciation (citing the Treasury Regulations and its own previous decision in *Salome* v. *United States, supra).* But this Court, in *United States* v. *Ludey* and *Burnet* v. *Niagra Falls Brewing Co.* (both *supra),* has rejected the requirement of reasonable *certainty* or *accuracy,* and required (at most) only "a reasonable approximation" *(Burnet* v. *Niagra Falls),* holding that merely a "rough estimate" is sufficient *(Ludey).* For, depreciation merely presents the question of *when* — not whether — depreciation in fact should be recognized in law.

3. Thirdly, the tax issue may be "an important question of federal law which has not been, but should be, settled by this Court" (again, in the language of this Court's Rule 19). The question of tax-depreciability of purchased goodwill or goodwill-related assets in general, or customer lists in particular, is an important question. There are many pending cases in courts at the present time involving this issue, as the record below reveals.[6]

4. It appears that a final alternative reason for granting the writ is that "the court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter" (Sup. Ct. Rule 19). Although the Fifth Circuit did not expressly declare that purchased customer lists or goodwill are always, as a matter of law, non-depreciable (for tax purposes), such is the only possible legal basis for its holding; and such basis is wrong and in conflict with a decision of the Second Circuit in which Judge Learned Hand ruled that

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6. And, e.g., *Richard S. Miller & Sons, Inc.* v. *United States,* which is presently pending in the Court of Claims, Docket No. 653-71. (BNA Tax Management Memorandum, August 23, 1971, p. 13.)

goodwill was a depreciable intangible.[7] If purchased goodwill can be a depreciable intangible (contrary to the Treasury Regulations), as Judge Learned Hand declared, then a purchased customer list is tax-depreciable *a fortiori* (since this does not expressly conflict with the Regulations).

CONCLUSION

The Fifth Circuit having invaded the province of the jury in matters of fact, in passing on the credibility of the witnesses and the weight (convincingness) to be given

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7. *Haberle Crystal Springs Brewing Co. v. Clarke, Collector,* 30 F.2d 219 (2d Cir.), reversed on other grounds, *Clarke v. The Haberle Crystal Springs Brewing Co.,* 280 U.S. 384, 50 S.Ct. 155, 74 L.Ed. 498 (1929).

As Judge Learned Hand explained in a later case, *Williams v. McGowan,* 152 F.2d 570, 572 (2d Cir. 1945), his holding as to goodwill being a depreciable intangible in *The Haberle Crystal Springs Brewing Co.* was not overturned by the Supreme Court which reversed that case on a different ground. And there are also numerous decisions by trial courts (from which the government prosecuted no appeal) holding that purchased customer lists or insurance "expirations" lists are depreciable, for tax purposes. See, e.g., *Manhattan Co. of Virginia, Inc. v. Commissioner,* 50 TC 78 (1968), *Reviewed by the Court* (1 dissent); *Vaaler Insurance, Inc. v. United States* (U.S.D.C. N.Dak., 1968), 68-1 USTC ¶9183.

Moreover, the Fifth Circuit's decision herein conflicts with what the Fifth Circuit itself said in *Salome v. United States,* 395 F.2d 990, *supra,* where the Fifth Circuit indicated that depreciability of purchased "expirations" or customer lists was a fact question, and that the taxpayers' position could be sustained by proving by a preponderance of the evidence that such asset did in fact depreciate. (We note parenthetically that the Fifth Circuit, both in the present case and in *Salome,* misinterpreted its own decision in *Commissioner v. Killian,* 314 F.2d 852, in ascribing to *Killian* a holding that insurance customer lists or "expirations" lists "have an indeterminate life span, and therefore are not subject to a deduction for depreciation"; *Killian* nowhere said, held, or implied this; *Killian* was concerned only with whether what the seller sold was an asset entitling him to long-term capital-gain treatment. In no way was *Killian* concerned with the purchasers. A Section 1231 asset, of course, is depreciable by the purchaser and brings capital gain to the seller, so there is no inconsistency in the *Killian* result and the Petitioners' position here.

their testimony, and weighing the preponderance of the evidence, this Court should summarily reverse, *per curiam,* the Fifth Circuit's judgment, and should order that the trial court's judgments on the jury's verdict be reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Writ of Certiorari have been served on the United States by airmailing, with postage prepaid, on this the____ day of September, 1971, the same to the following:

(1) Erwin N. Griswold, Esquire
Solicitor General
Department of Justice
Washington, D. C. 20530

(2) Meyer Rothwacks, Esquire
Chief, Appellate Section
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JOHN A. BAILEY

APPENDIX A

Taxing Statutes and Regulations Involved

Taxing Statutes Involved:

Internal Revenue Code of 1954:

Section 167. *Depreciation.*

(a) *General Rule.* There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

(1) of property used in the trade or business, or

(2) of property held for the production of income.

(b) *Use of Certain Methods and Rates.* For taxable years ending after December 31, 1953, the term "reasonable allowance" as used in subsection (a) shall include (but shall not be limited to) an allowance computed in accordance with regulations prescribed by the Secretary or his delegate, under any of the following methods:

(1) the straight line method.

(2) the declining balance method, using a rate not exceeding twice the rate which, when added to all allowances for the period commencing with the taxpayer's use of the property and including the taxable year, does not, during the first two-thirds of the useful life of the property, exceed the total of such allowances which would have been used had such allowances been computed under the method described in paragraph (2).

Nothing in this subsection shall be construed to limit or reduce an allowance otherwise allowable under subsection (a).

(c) *Limitations on Use of Certain Methods and Rates.* Paragraphs (2) (3), and (4) of subsection (b) shall apply only in the case of property (other than intangible property) described in subsection (a) with a useful life of 3 years or more * * *

(d) *Agreement as to Useful Life on Which Depreciation Rate is Based.* Where, under regulations prescribed by the Secretary or his delegate, the taxpayer and the Secretary or his delegate have, after the date of enactment of this title, entered into an agreement in writing specifically dealing with the useful life and rate of depreciation of any property, the rate so agreed upon shall be binding on both the taxpayer and the Secretary in the absence of facts or circumstances not taken into consideration in the adoption of such agreement. The responsibility of establishing the existence of such facts and circumstances shall rest with the party initiating the modfication. Any change in the agreed rate and useful life specified in the agreement shall not be affective for taxable years before the taxable year in which notice in writing by certified mail or registered mail is served by the party to the agreement initiatng such change.

Treasury Regulatons on Income Tax (1954 Code) (26 C.F.R.):

Sec. 1.167(a)-1. *Depreciation in general*

(a) *Reasonable allowance.* Section 167(a) provides that a reasonable allowance for the exhaustion, wear and tear, and obsolescence of property used in the trade or business or of property held by the taxpayer for the production of income shall be allowed as a depreciation deduction. The allowance is that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan (not necessarily at a uniform rate), so that the ag-

gregate of the amounts set aside, plus the salvage value, will, at the end of the estimated useful life of the depreciable property, equal the cost or other basis of the property as provided in section 167(g) and §1.167(g) 1. An asset shall not be depreciated below a reasonable salvage value under any method of computing depreciation. However, see section 167(f) and §1.167(f)-1 for rules which permit a reduction in the amount of salvage value to be taken into account for certain personal property acquired after October 16, 1962. See also paragraph (c) of this section for defintion of salvage. The allowance shall not reflect amounts representing a mere reduction in market value. See section 179 and §1.179-1 for a further description of the term "reasonable allowance."

(b) *Useful life.* For the purpose of section 167 the estimated useful life of an asset is not necessarily the useful life inherent in the asset but is the period over which the asset may reasonably be expected to be useful to the taxpayer in his trade or business or in the production of his income. This period shall be determined by reference to his experience with similar property taking into account present conditions and probable future developments. Some of the factors to be consdered in determining this period are (1) wear and tear and decay or decline from natural causes, (2) the normal progress of the art, economic changes, inventions, and current developments within the industry and the taxpayer's trade or business, (3) the climatic and other local conditions peculiar to the taxpayer's trade or business, and (4) the taxpayer's policy as to repairs, renewals, and replacements. Salvage value is not a factor for the purpose of determining useful lfe. If the taxpayer's experience is inadequate, the general experience in the industry may be used until such time as the taxpayer's own experience forms an adequate basis for

making the determination. The estimated remaining useful life may be subject to modification by reason of conditions known to exist at the end of the taxable year and shall be redetermined when necessary regardless of the method of computing depreciation. However, estimated remaining useful life shall be redetermined only when the change in the useful life is significant and there is a clear and convincing basis for the redetermination. For rules covering agreements with respect to useful life, see section 167(d) and §1.167(d)-1.

(c) *Salvage.* (1) Salvage value is the amount (determined at the time of acquisition) which is estimated will be realizable upon sale or other disposition of an asset when it is no longer useful in the taxpayer's trade or business or in the production of his income and is to be retired from service by the taxpayer. Salvage value shall not be changed at any time after the determination made at the time of acquisiton merely because of changes in price levels. However, if there is a redetermination of useful life under the rules of paragraph (b) of this section, salvage value may be redetermined based upon facts known at the time of such redetermination of useful life. Salvage, when reduced by the cost of removal, is referred to as net salvage. The time at which an asset is retired from service may vary according to the policy of the taxpayer. If the taxpayer's policy is to dispose of assets which are still in good operating condition, the salvage value may represent a relatively large proportion of the original basis of the asset. However, if the taxpayer customarily uses an asset until its inherent useful life has been substantially exhausted, salvage value may represent no more than junk value. Salvage value must be taken into account in determining the deprecation deduction either by a reduction of the amount subject to depreciation or by a reduction in the rate of deprecia-

tion, but in no event shall an asset (or an account) be depreciated below a reasonable salvage value. See, however, paragraph (a) of §1.167(b)-2 for the treatment of salvage under the declining balance method, and §1.179-1 for the treatment of salvage in computing the additional first-year depreciation allowance. The taxpayer may use either salvage or net salvage in determining depreciation allowances but such practice must be consistently followed and the treatment of the costs of removal must be consistent with the practice adopted. For specific treatment of salvage value, see §§1.167(b)-1, 1.167(b)-2, and 1.167(b)-3. When an asset is retired or dsposed of, approprate adjustments shall be made in the asset and depreciation reserve accounts. For example, the amount of the salvage adjusted for the costs of removal may be credited to the depreciation reserve.

(2) For taxable years beginning after December 31, 1961, and ending after October 16, 1962, see section 167(f) and §1.167(f)-1 for rules applicable to the reduction of salvage value taken into account for certain personal property acquired after October 16, 1962.

* * *

Sec. 1.167(a)-3 *Intangibles.*

If an intangible asset is known from experience or other factors to be of use in the business or in the production of income for only a limited period, the length of which can be estimated with reasonable accuracy, such an intangible asset may be the subject of a depreciation allowance. Examples are patents and copyrights. An intangible asset, the useful life of which is not limited, is not subject to the allowance for deprecation. No allowance will be permitted merely because, in the unsupported opinion

of the taxpayer, the intangible asset has a limited useful life. No deduction for depreciation is allowable with respect to goodwill. For rules with respect to organizational expenditures, see secton 248 and the regulatons thereunder. For rules with respect to trademark and trade name expenditures, see section 177 and the regulations thereunder.

Sec. 1.167(b)-O. *Methods of Computing Depreciation.* —(a) *In general.* Any reasonable and consistently applied method of computing depreciation may be used or continued in use under section 167. Regardless of the method used in computing depreciation, deductions for depreciation shall not exceed such amounts as may be necessary to recover the unrecovered cost or other basis less salvage during the remaining useful life of the property. The reasonableness of any claim for depreciation shall be determined upon the basis of conditions known to exist at the end of the period for which the return is made. It is the responsibility of the taxpayer to establish the reasonableness of the deduction for depreciation claimed. Generally, depreciation deductions so claimed will be changed only where there is a clear and convincing basis for a change.

APPENDIX B

VERDICT, JUDGMENT AND ORDER IN TRIAL COURT AND OPINION JUDGMENT AND ORDER OF APPELLATE COURT

VERDICT

(Caption Omitted)

(Filed Nov. 15, 1969)

Question No. One

Does the expiration list purchased by plaintiffs have a useful life which is reasonably ascertainable?

Answer this Question either "Yes" or "No."

Answer: Yes.

If you have answered Question No. One "Yes," and only in that event, then answer Question No. Two.

Question No. Two

What is the useful life?

Answer this Question in terms of years.

Answer: 6 (six) years.

You are instructed that the expiration list purchased by plaintiffs is described in joint Exhibit A as follows:

> "All of the 'expirations' or 'expiration dates' and 'rights to renewals' of the policies, as well as the 'daily reports' of the policies in force of all of the itemized named policies attached hereto and marked Exhibit A."

11-14-69
Date

O. JO. BUSER
Foreman of the Jury

[Trial Court]

JUDGMENT

(Caption Omitted)

(Filed November 25, 1969)

This action having been tried and a verdict for the Plaintiffs having been duly rendered by the Jury on the 14th day of November, 1969,

IT IS ORDERED, ADJUDGED and DECREED that the Plaintiffs, W. Tucker Blaine, Sr. and wife Lorraine M. Blaine, do have and recover of and from the Defendant, the United States of America, the sum of SEVEN THOUSAND ONE HUNDRED SIXTY ONE and 45/100 DOLLARS ($7,161.45), plus interest on said sum as provided by law, together with the costs of this action.

It is further ORDERED that the Motion of the Defendant for Directed Verdict be and the same is hereby denied.

Entered this 25th day of November, 1969.

JOHN V. SINGLETON, JR.
United States District Judge

Approved as to form:

JOHN A. BAILEY
Attorney for Plaintiffs

WENDELL BARNETT
Attorney for Defendant

[Similar judgments on the verdict, varying only in amounts, were entered in favor of the other petitioners.]

UNITED STATES DISTRICT COURT
Southern District of Texas
Office of the Clerk

V. Bailey Thomas
Clerk

December 29, 1969

Re: C.A. 69-H-156—W. Tucker Blaine, Sr. et al vs. United States of America

Mr. John A. Bailey
1721 Chamber of Commerce Bldg.
Houston, Texas 77002

Mr. Wendell Barnett
Room 5710, Star Building
Tax Division, Department of Justice
Washington, D. C. 20530

Gentlemen:
Judge John V. Singleton, Jr. has made the following entry on the Calendar Sheet in the above styled and numbered cause:

"12-23-69: The Government's Motion for Judgment Notwithstanding the Verdict is OVERRULED. JVSJR."

Very truly your,

V. BAILEY THOMAS, Clerk

By RHODA MULLINS
Rhoda Mullins, Deputy

cc: Mr. George R. Pain
Assistant U. S. Attorney

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 29533

W. TUCKER BLAINE, SR., ET AL,
Plaintiffs-Appellees,

versus

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

(April 30, 1971)

Before JONES, GEWIN and CLARK, Circuit Judges.

JONES, Circuit Judge: Seven consolidated claims for the refund of $21,593.59 in Federal income taxes are involved in this appeal. Blaine Associates is a partnership operating an insurance agency. During the years in issue, 1962-1964, the partners, taxpayers, sought to depreciate certain insurance expirations[1] which the partnership had

1. In its instructions to the jury, the court defined insurance expirations as being:

> . . . records of an insurance agency by which the agent has available a copy of the policy issued to the insured or records containing the date of the insurance policy, the name of the insured, the date of its expiration, the amount of insurance, premiums, property covered, and terms of insurance. This information enables the agent to contact the insured before the existing contract expires and arms him with the information essential to secure another policy and to present to the insured a solution for his insurance requirements. This expiration list is an asset that is characterized as intangible personal property.

purchased under a contract calling for a maximum price of $96,000.00 and a minimum price of $60,000.00.[2] The Commissioner disallowed the depreciation deductions for the stated reason that insurance expirations do not have a reasonably ascertainable useful life, and are in the nature of goodwill. The taxpayers paid the resulting deficiencies, and filed claim for refund. The refund claims were disallowed. Suit for refunds was brought in the district court. The jury returned a special verdict finding that the expirations involved had a useful life of six years. Judgment was entered for tax refunds reflecting the allowance of $96,000.00 in depreciation deductions over a six year period. Motion for judgment notwithstanding the verdict was made and overruled. The United States brings this appeal contending that insurance expirations are goodwill of an insurance agency and not depreciable as a matter of law, and even if they are depreciable the finding of a useful life of six years is clearly erroneous. Finally the Government argues that should depreciation be allowed, the judgment below should be reduced to properly reflect the actual cost incurred during the tax years in issue.

The expirations were purchased from one Fabian Corporation which had on the same day acquired the list from Garth Bates & Company, a mortgage loan business,

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2. The contract was terminable by either party on 90 days notice after payment of $60,000. The $96,000 price was approximately 3.2 times average annual commissions from the accounts listed. The price was payable as follows: $24,000 down, the balance being payable quarterly in amounts equal to 30% of net commissions earned by Blaine Associates on new policies arising from the "expirations" list until the additional principal sum of $36,000 should be paid (i.e., a total of $60,000), when the percentage of commissions would be reduced 20%. The unpaid balance bore interest at the rate of 3% per annum which the agreed installment payments included.

which also operated a fire and casualty insurance business. In addition to the expiration list, Blaine acquired from Fabian Bates' covenant not to compete for the listed customers' business for a six year period. The covenant was a part of the transaction. Copies of the expiration list were retained by both Fabrian Corporation and Bates Company. Under the agreement Bates was free to remain in the insurance business in the same area, and in fact did so. Nothing was transferred to the taxpayers other than the expiration list and the covenant not to compete.

Bates had sold most of its fire and casualty policies in connection with its home mortgage loan business. There was evidence that the average life of a mortgage loan was six or seven years. The taxpayers assert that the insurance renewal period would be the same as the duration of the mortgage servicing by the agent.

Witnesses testified that the insurance renewals in question were likely to be lost not only by the death of the insured or the termination of the mortgage loan, but also because homeowners frequently sell their homes, move away, or choose to do business with another company. Blaine experienced a steady attrition of customers that were among the Bates expirations. Over a third failed to renew the policies with Blaine when they first came up for renewal after the 1962 transaction. Many more were lost who renewed once, but not a second or third time. More were lost in the ensuing years.

It was stated in the testimony that referral business was not anticipated to any significant extent. The actual number of referrals amounted to less than one-third of one percent of the listings on the expiration list.

Persons in the insurance business, some of them being interested in the outcome of the cause, testified that the expirations had a terminable life usually fixed at six years. By these witnesses it was asserted that the homeowner's policy was tied to the homeowner's mortgage loan, the average life of both being about seven years. Some of the witnesses stressed the six year term of the covenant not to compete as fixing the useful life of the expiration list.

The taxpayers' burden in this case was to show by a preponderance of credible and convincing evidence that these expirations are to be legally distinguished from those in *Commissioner of Internal Revenue v. Killian,* 5th Cir. 1963, 314 F.2d 852. The governing rule was recently expressed in *Salome v. United States* where it was said:

> To qualify intangible property for amortization, taxpayers had the burden of establishing that it was of use in the business for only a limited time and that the length of this period was estimable with reasonable accuracy. Treas. Reg. § 1.167(a)-3 (1956). If they had developed evidence, their task would have been to distinguish the so-called renewals they purchased from the insurance dailies, subscription lists, and expirations involved in Commissioner of Internal Revenue v. Killian, 5th Cir. 1963, 314 F.2d 852. There the Court held that the dailies, subscription lists, and expirations common to a fire, casualty, and automobile agency are in the nature of goodwill, have an indeterminate life span, and therefore are not subject to a deduction for depreciation. 395 F.2d 990 (1968)

In Salome the Court held that the plaintiffs failed to meet their burden of proof. It is here concluded that the taxpayers have likewise failed to meet their burden of showing by a preponderance of credible, convincing evi-

dence that the particular assets involved had a limited useful life which could be estimated with reasonable certainty. Other decisions are in accord regarding assets characterized as insurance expirations, dailies or lists. *Marsh & McClennan v. Commissioner*, 3rd Cir. 1969, 420 F.2d 667; *Thoms v. Commissioner*, 1968, 50 TC 247.

Much reliance has been placed by the taxpayers on the tie of the insurance with the mortgage servicing of the Bates organization. Whatever the evidence of this relationship might have shown with respect to a useful life of the insurance renewals while tied to the mortgage servicing, it cannot be said that the mortgage servicing has any bearing whatever on fixing a useful life of the insurance renewals after the severance of the expirations from the mortgage servicing.

The evidence relating to the referrals makes substantially no contribution to the solution of the problem here presented. The remaining evidence is that of the insurance agents, the experts so-called. These witnesses gave opinions unsupported by facts of substance and materiality that the expirations did have a terminable useful life which they generally fixed at six years. Neither this evidence nor the covenant not to compete are enough to take the case out of the operation of the Killian and Salome cases. The principles announced in these cases require the entry of a judgment notwithstanding the verdict. *Boeing Company v. Shipman*, 5th Cir. 1969, 411 F.2d 365. In order that such a judgment may be entered, the judgment of the district court is reversed and the cause is remanded.

REVERSED AND REMANDED.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1970

No. 29533

D. C. Docket No. CA 69-H-156-157-158-159-161-162-163

W. TUCKER BLAINE, SR., ET AL,
Plaintiffs-Appellees,

versus

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

Before JONES, GEWIN and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that plaintiffs-appellees pay to defendant-appellant, the costs on appeal to be taxed by the Clerk of this Court.

April 30, 1971

Issued As Mandate June 29, 1971

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 29533

W. TUCKER BLAINE, SR., ET AL,
Plaintiffs-Appellees,

versus

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Apr. 30, 1971, 5 Cir., 1971, ___F.2d___).

(June 21, 1971)

Before JONES, GEWIN and CLARK, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

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Supreme Court, U.S.
FILED
OCT 15 1971
E. ROBERT SEAVER, CLERK

No. 71-389

In the Supreme Court of the United States

OCTOBER TERM, 1971

W. TUCKER BLAINE, SR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
FRED B. UGAST,
Acting Assistant Attorney General,
THOMAS L. STAPLETON,
WILLIAM L. GOLDMAN,
Attorneys,
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Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-389

W. TUCKER BLAINE, SR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court's charge to the jury and the jury's verdict (Pet. App. 19) are not reported. The opinion of the court of appeals (Pet. App. 22-26) is reported at 441 F. 2d 917.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1971 (Pet. App. 27). A petition for rehearing and for rehearing *en banc* was denied on June 21, 1971 (Pet. App. 28). The petition for a writ of certiorari was filed on September 17, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

446-900—71

QUESTION PRESENTED

Whether insurance expirations are part of an insurance agency's goodwill, and are therefore nondepreciable as a matter of law, because goodwill has an indeterminate useful life.

STATUTE AND REGULATIONS INVOLVED

The pertinent statutory and regulatory provisions are set forth in Appendix A to the petition (Pet. App. 13–18).

STATEMENT

Petitioners were partners in an insurance agency. During 1962, the agency purchased more than 2,000 fire and casualty insurance expirations—records showing the name of the insured, the date of expiration of his policy, the premiums, the property covered, and the terms of insurance. Such expirations are valuable, in that they place the owner in a position to secure renewal of the policy and new business, and thereby to earn commissions. (Pet. App. 23–24.)

In this litigation involving the taxable years 1962–1964, petitioners claimed that they were entitled to depreciate the cost of the expirations over a six-year period. The Commissioner disallowed the deductions on the ground that insurance expirations constitute part of the goodwill of an insurance agency and, therefore, are nondepreciable, since goodwill does not have a reasonably ascertainable useful life. (Pet. App. 22–23.)

Following a jury trial, the district court, rejecting the government's motions for a directed verdict and

for judgment n.o.v., entered judgments for petitioners pursuant to the jury verdict (Pet. App. 19, 20, 23). The court of appeals reversed, holding that the expirations were not depreciable as a matter of law (Pet. App. 22-26).[1]

ARGUMENT

The decision below is correct. There is no conflict or any other reason for further review.

1. An intangible asset may qualify for the allowance for depreciation if it is known to be of use in a business for a limited time which can be estimated with reasonable accuracy. Treasury Regulations 1.167(a)-3. But goodwill—those advantages and qualities of a business which attract customers and patronage (see *Menendez* v. *Holt*, 128 U.S. 514)—is not depreciable because it has an indeterminate useful life. Treasury Regulations 1.167(a)-3: *Marsh & McLennan, Inc.* v. *Commissioner*, 420 F. 2d 667 (C.A. 3).

For an insurance agency, insurance expirations are in the nature of goodwill. In the first instance, they enable the agency to secure policy renewals. But, contrary to the assumption implicit in petitioners' argument, the value of insurance expirations does not necessarily end with the failure of particular policyholders to renew their policies. It may well persist indefinitely in the form of new business resulting from

[1] Having held for the government on the principal issue, the court of appeals found it unnecessary to reach the government's alternative arguments that petitioners' "cost" of insurance expirations was substantially less than that claimed, and that the finding of a six-year useful life for the expirations was clearly erroneous, assuming the expirations were depreciable.

referrals and from those policyholders who allow their policies to lapse, but later seek insurance coverage. The appellate courts and the Tax Court consequently have held that insurance expirations have an indeterminate useful life and are not depreciable. See *Marsh & McLennan, Inc.* v. *Commissioner, supra; Salome* v. *United States,* 395 F. 2d 990 (C.A. 5); *Comissioner* v. *Killian,* 314 F. 2d 852 (C.A. 5); *Thoms* v. *Comissioner,* 50 T.C. 247; see also, *Skilken* v. *Commissioner,* 420 F. 2d 266 (C.A. 6) (vending machine locations); *Golden State Towel and Linen Service, Ltd.* v. *United States,* 373 F. 2d 938 (Ct. Cl.) (customer lists); *Boe* v. *Commissioner,* 307 F. 2d 339 (C.A. 9) (medical service contracts); *Thrifticheck Service Corp.* v. *Commissioner,* 287 F. 2d 1 (C.A. 2) (customer contracts); *Meredith Pub. Co.* v. *Commissioner,* 64 F. 2d 890 (C.A. 8) (subscription list).

2. There is no conflict with the Second Circuit's decision in *Haberle Crystal Springs Brewing Co.* v. *Clark,* 30 F. 2d 219, reversed on other grounds, *Clark* v. *Haberle Brewing Co.,* 280 U.S. 384, as petitioners assert (Pet. 11). In *Haberle* the taxpayer was permitted a deduction for the obsolescence of its goodwill because, by reason of the passage of the prohibition amendment to the Constitution, its business was terminated. The instant case does not involve a terminating business but a continuing one. Moreover, the Second Circuit has since made it plain that it adheres to the uniform rule that where a business continues, the cost of goodwill may not be deducted currently. *Thrifticheck Service Corp.* v. *Commissioner,*

supra; United States Industrial Alcohol Co. v. *Helvering,* 137 F. 2d 511 (C.A. 2).[2]

3. Contrary to petitioners' claim (Pet. 7–9), the court of appeals neither passed on the credibility of witnesses nor substituted its factual determinations for those of the jury. The court made no factual findings at all. It merely followed its prior decisions in *Killian* and *Salome,* and held that insurance expirations are not depreciable as a matter of law. The court's references to the evidence were only in the context of petitioners' failure to show that their insurance expirations were different from those considered in the earlier cases.[3]

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[2] Petitioners cite (Pet. 11, n. 7) several trial court decisions permitting depreciation of insurance expirations. These decisions afford no basis for review by this Court. Moreover, all of the cited cases were decided before the recent decisions of the Third and Fifth Circuits and the Tax Court.

[3] By motion filed in this Court on September 23, 1971, petitioners seek an order compelling the government to furnish a list of court cases and controversies pending before the Internal Revenue Service involving the issue herein. A subscription service setting forth all pending court litigation by subject matter is available to all taxpayers upon request and payment of the appropriate fee to the Clearing House for Federal Scientific and Technical Information, U.S. Commerce Department. See T.I.R. 993, October 7, 1968, 1968 CCH Standard Federal Tax Reporter, par. 6929j, Vol. 7. The Internal Revenue Service advises that there are presently pending six court cases dealing with the proper treatment of insurance expirations. No information is available with respect to the number of cases pending at the administrative level, and it would involve considerable time, effort and expense for the National Office of the Internal Revenue Service to communicate with the approximately 100 district director and appellate division offices in the country and then to collate the data received, in order to com-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERVIN N. GRISWOLD,
Solicitor General.

FRED B. UG T,
Acting Assistant Attorney General.

THOMAS L. STAPLETON,
WILLIAM L. GOLDMAN,
Attorneys.

OCTOBER 1971.

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pile a list of cases pending at the administrative level. In any event, we know of no authority authorizing discovery in this Court in cases on the appellate docket. While the issue raised here does recur, it will be time enough to consider whether it is of sufficient importance to warrant review by this Court if a conflict develops in the circuits.

U.S. GOVERNMENT PRINTING OFFICE: 1971